



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO. 10 OF 2013

MAUMAR NABEEL ONYANGO KHAN.....PETITIONER

VERSUS

THE COUNCIL OF LEGAL EDUCATION.....1ST RESPONDENT

THE KENYA SCHOOL OF LAW.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

J U D G M E N T

On 17-7-2009 the petitioner received a Bachelor of Arts degree in Politics and Law from the University of Bradford in the United Kingdom. On 1-12-2011 he was awarded a Masters of Laws degree by the University of London, the School of Oriental and African Studies, of the United Kingdom. On 10-10-2011 he applied to the 2nd respondent for admission into the Advocates Training Programme (ATP) in the year 2012. On 11-1-2012 the Dean of the 2nd respondent (who is also the Secretary of the 1st respondent) wrote to reject the application on the basis that he (the petitioner) was not a holder of a Bachelor of Laws degree. On 24-1-2013 the petitioner wrote a letter of appeal against the decision of the respondents. A response was done on 12-8-2012 indicating that the current regulations governing admission to the Roll of Advocates required a Bachelor of Laws degree from a recognised University, and yet his degree was a Bachelor of Arts degree in Politics and Law. On 27-3-2013 the petitioner asked the respondents to review their decision. On 26-3-2013 the request was declined. This is when on 23-5-2013 he filed this petition.

The petitioner sought the following prayers:

- a. a declaration that his qualification of BA (HONS) in Politics and Law together with his LLM degree met the threshold under section 5 (c) of the Council of Legal Education Regulations, 2009, and, in the alternative, a declaration that his BA (HONS) degree in Politics and Law was an equivalent of a Bachelor of Laws degree;
- b. a declaration that the Legal Education Act No. 27 of 2012 which commenced on 28-9-2012 cannot apply retrospectively and therefore did not apply to his application;
- c. a declaration that the 2nd respondent's letters dated 11-1-2012, 12-2-2013 and 26-3-2013, and their contents, were an infringement of his constitutional rights, and/or, in the alternative, bring the letters into this court by order of Certiorari and quash them (the decisions contained therein);
- d. an order of Mandamus be issued to compel the respondents to admit him upon his successful completion of the requisite core subjects as communicated in the letter dated 10-1-2013 and or any other or further subjects that shall be deemed necessary;
- e. the 1st and 2nd respondents to be ordered to pay damages to the petitioner for the infringement of his constitutional rights; and

f. costs.

It should be pointed out that on 10-1-2013 the respondents wrote to the petitioner as follows:

“it is regretted that your application was not successful due to the reasons that your LLB degree does not meet the threshold of 16 core subjects prescribed by law for purposes of admission to the ATP. The courses missing are:

- i. **Family Law and Succession.**
- ii. **Law of Evidence.**
- iii. **Jurisprudence.**
- iv. **Labour Law.”**

However, by letter dated 12-2-2012 (it should be 12-2-2013 as it was responding to letter dated 24-1-2013) the respondents reiterated the need for a Bachelor of Laws degree instead of a Bachelor of Arts degree in Politics and Law. In the last paragraph of the letter the following is stated:

“Please note that our letter dated January, 2013 which purported to recognise “your LL.B” degree was issued in error and is hereby withdrawn.”

Lastly, the Solicitors Regulations Authority is the body that governs the legal profession in England. One of its functions is to assess each law student's qualifications and issue academic clearance to study the Legal Practitioner's Course (LPC) in the U.K. (which is the ATP equivalent in Kenya). The Authority wrote to say that the petitioner had satisfactorily completed the equivalent of a LLB Qualifying Law Degree (QLD) and could commence the LPC course in the U.K. The petitioner presented this clearance to the respondents whose response was that he still did not qualify in accordance with the obtaining law and regulations in Kenya.

Professor W. Kulundu Bitonye is the Director of the 2nd respondent and Secretary of the 1st respondent. He swore a replying affidavit to oppose the petition. His case was that process of admission and training at the Kenya School of Law for conferment of the Diploma in Law (necessary for the petitioner to be admitted to the Roll of Advocates) was governed under section 8 of the Legal Education Act, 2011 and section 4 of the Kenya School of Law Act, 2012. Prior to the two legislations, the law attending to the admission, training and qualification for the Diploma in Law at the Kenya School of Law was the Council of Legal Education Act (Cap 16A) and the rules made thereunder. The Act was repealed by Act No. 27 of 2012. The Council of Legal Education Act was incepted in 1995 and was a complete code governing the attainment of legal education in Kenya.

Professor Kulundu Bitonye swore that at the time the petitioner commenced and attained his degree, the operational law for admission to the Kenya School of Law was Council of Legal Education Act and the Council of Legal Education (Kenya School of Law) Regulations, 1997 which were later repealed and replaced with the Council of Legal Education (Admission) Regulations, 2009. The Regulations provided that the applicant had, inter alia, to show:

- a. *prima facie* evidence that he possess an LLB degree from accredited institutions, whether local or foreign; and
- b. evidence that he sat and passed university qualifying examinations and attained a minimum grade of B (plain) in English or its equivalent.

In the Council of Legal Education (Kenya School of Law) Regulations, 2009 relating to Admission's Regulations into the Advocates Training Programme, the applicant must be a holder or has become eligible for the conferment of the Bachelor of Laws Degree (LLB), among other qualifications. The respondents case was that they considered the petitioner's BA degree in Politics and Law, and his other documents, against the statutes and regulations obtaining and concluded that he did not qualify for admission. They found that the petitioner's degree was not the equivalent of an LLB degree.

The law governing admission in the School of Law is to be found in the Legal Education Act and the Kenya School of Law Act. Section 3 of the Legal Education Act sets out the objective of the Act as follows:

“To promote legal education and the maintenance of the highest possible standards in legal education.”

The Council established in the repealed Act was succeeded by the Council under the Legal Education Act whose section 8 (3) (a) authorised it to make regulations in respect of requirements for admission of persons seeking to enroll for legal education programmes. Section 22 provides for the core courses that the appellant must have sat and passed at the degree level. Part II of the Second Schedule sets out the 16 core courses which a prospective applicant for the post graduate diploma must have sat and passed.

Section 3 of the Kenya School of Law Act establishes the Kenya School of Law. Under section 4 of the Act the Kenya School of Law is a public legal admission provider responsible for the provision of professional legal training as an agent of the government. Section 16 and Schedule 2 of the Act provide for the admission requirements to the Advocates Training Programme (ATP). Schedule 2 provides that the applicant must have an LLB degree, among other requirements. It states as follows:

“(1) A person shall be admitted to the school if:

- a. **having passed the relevant examination of any recognised university in Kenya holds, or has become eligible for the conferment of the Bachelor of Laws Degree (LLB) of that university; or**
- b. **having passed the relevant examination of a university, university college or other institutions prescribed by the Council of Legal Education, holds or has become eligible for the conferment of the Bachelors Law Degree (LLB) in the grant of that university, university college or other institutions:**
 - i. **attained a minimum entry requirement for admission to a university in Kenya; and**
 - ii. **obtained a minimum grade B (plain) in English or Kiswahili and a mean grade of C (plus) in the Kenya Certificate of Secondary Education or its equivalent;**
- c. **A bachelor of laws (LLB) from a recognised university and attained a minimum grade C+ (C plus) in English and a minimum aggregate grade C (plain) in the Kenya Certificate of Secondary Examination, holds a higher qualification e.g A levels 1B, relevant Diploma, other undergraduate degree or has attained a higher degree in law after the undergraduate in the Bachelor of laws programme.”**

The position of the respondents was that even if the Legal Education Act and the Kenya School of Law Act have to be considered, the petitioner would still not qualify for admission as he does not possess an LLB degree.

Mr Kirenga for the petitioner and M/S Ochieng Onyango Kibet & Ohanga for the 1st and 2nd respondents filed written submissions and made reference to various decided cases I am grateful to them.

In dealing with this petition, I bear in mind that the 1st respondent is statutorily mandated to regulate legal education and training in Kenya and to make regulations in respect of requirements for the admissions of persons seeking to enroll in legal education programmes. The Kenya School of Law is the public legal education provider responsible for the provision of professional legal training as an agent of the Government of Kenya. Admission to the Kenya School of Law is regulated by law, and regulations have been made to support that law.

In the Indian case of **Maharashtra State Board -VS- Kurmarsheth & Others [1985] CLR 1083**, it was stated as follows:

“So long as the body entrusted with the task of framing the rules and regulations acts within the scope of the authority conferred on it in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations.....”

The same court emphasised the need:

“.....to be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formatted by professional men possessing technical expertise and rich experience of actual day to day working of educational institutions and departments controlling them.”

These views have been accepted as good jurisprudence by the Kenyan Courts. For instance, in **The Kenya National Examinations Council -VS- Republic, ex-parte Kemunto Regina Ouru, Civil Appeal No. 127 of 2009** at Nairobi the 128 respondents registered for the 2008 Kenya Certificate of Secondary Examination. They took the exam. The examination was marked and the results processed. They were notified that their results had been cancelled because they were involved in an examination irregularity. The High Court found that the Council had exercised its discretionary powers entailing investigation and inquiry before cancelling the results; that such investigations should have entailed giving each affected student a notice to show cause why the results should not be cancelled; and now that such notice was not given and the action taken was drastic, the Council had violated the cardinal principle of natural justice by not affording a hearing. The court granted orders of Certiorari and Mandamus. The Court of Appeal, relying on the decision above and others, reversed that decision. It found that the rules and regulations governing the conduct of examinations were adequate and fair and that:

“The process has worked for many years and unless it is shown that the system is fundamentally flawed and there is a better system which may be used in place thereof, this court will be reluctant to suggest a different and untested system, moreso because it does not possess the requisite technical expertise.”

The second issue to consider is that, the court was asked to grant an order of Mandamus

“to compel the respondents to admit the petitioner upon his successful completion of the requisite core subjects as communicated in the letter dated 10th January 2013 and or any other or further core subjects that shall be deemed necessary.”

The decision to admit or not to admit a student to the Kenya School of Law belongs to the respondents. The decision is discretionary guided by the relevant statutes and regularities. Whether or not the student has completed the necessary core subjects can only be determined by the respondents. In the prayer, and in paragraph 7 of the petitioner's supplementary affidavit sworn on 17-12-2013, there is an admission that he does not have results of 10 core subjects. The respondents must therefore wait for the submission of those results to be able to determine whether they enable him to be admitted. In which case, the petition was premature. But more important, Mandamus issues to compel a person to perform a particular duty imposed on him by statute which duty he has refused to perform to the detriment of the applicant (**Jotham Mulati Welamondi -VS- The Electoral Commission of Kenya, H.C. Misc Application No. 81 of 2002 at Bungoma**). It cannot issue to compel the exercise of discretionary power let alone the exercise with a view to arriving at a particular result. Of course, where the applicant is able to show that the decision or act complained of is tainted with illegality, irrationality or procedural impropriety then judicial review orders may issue (**An Application by Bukoba Gymkhana Club [1963] EA 478**).

Further, Mandamus cannot issue in the manner sought as that would be placing the court in the shoes of the respondents to determine the merits of the petitioner's request for admission (**Susan Mungai -VS- The Council of Legal Education & Others, H.C (Constitutional & Judicial Review Division) Petition No. 152 of 2011 at Nairobi**).

Lastly, the petition was brought claiming the violation of the petitioner's fundamental rights and freedom

under Articles 27, 43, 47, 55 (a) of the Constitution of Kenya, 2010. I agree with the respondents that a person alleging infringement or threatened infringement of fundamental rights and freedoms must specify and particularise the right or freedom infringed or threatened to be infringed, and the factual correlation (**Anarita Karimi Njeru -VS- Republic (No. 1) [1979] KLR 154**). All that the petitioner was able to show was that he had a certain qualification which he believed entitled him to be admitted to the Kenya School of Law but that when presented to the respondents they responded that the qualification was insufficient. The respondents told him that in rejecting the application they were enforcing statutory requirements governing admission. The question to be answered by the court was, therefore, whether or not the respondents were backed by the law. There was no evidence given to show any violation, or threatened violation, of any fundamental right or freedom of the petitioner.

Back to the crucial, and only question: did the petitioner qualify to be admitted to the Kenya School of Law? Once again, it is emphasised that the decision to admit or not to admit belonged to the respondents. Once they showed that they were acting within the law, doing so fairly and that they were subjecting the petitioner to the same standards they were subjecting other candidates, the court cannot interfere. The respondents must be left with the power to insist on the highest possible professional standards for those who wish to qualify as advocates (**Republic -VS- The Council of Legal Education Ex-parte James Njuguna & Others, Misc. Civil Application No. 137 of 2004** at Nairobi).

The petitioner stated that his qualifications under section (1) (a) and (b) of the Advocates Act and admission requirements set out in the Council of Legal Education (Kenya School of Law) Regulations 2009 allowed him to be admitted to the Kenya School Law. Regarding the 2009 Regulations, he referred to regulation (c) under the Admissions Requirements into the Advocates Training Programme which require:

“a Bachelor of Laws Degree (LLB) from a recognised university and attained a minimum grade of C+ (C plus) in English and a minimum aggregate grade of C (plain) in the Kenya Certificate of Secondary Examinations, holds a higher degree qualification e.g “A” levels, “1B”, relevant “Diploma”, other “undergraduate” degree or has attained a higher degree in law after the undergraduate studies in the Bachelor of Laws Programme”.

I agree with the respondents that that the meaning of this regulation is clear. The person seeking admission has not attained the minimum entry requirements for admission to a university of Kenya but has an LLB degree got from a foreign university recognised by the Council of Legal Education. Such person must show that he had attained a minimum grade C+ in English and a minimum aggregate of C (plain) in the KCSE. He must also show that he has either “A level, “1B”, relevant “Diploma”, or other “undergraduate degree” or has attained a higher degree in law after the undergraduate studies in the Bachelor of Law. In the instant case, whatever other qualification that the petitioner has, he does not hold an LLB degree and therefore would not qualify for admission.

Regarding section 13(1) (a) of the Advocates Act (Cap 16), it is indicated that:

“A person shall be duly qualified if:

(a) Having passed the relevant examinations of any recognised university in Kenya or has become eligible for the conferment of a degree in law of that university; or

(b) Having passed the relevant examinations of such university, university college or other institution as the the Council of Legal

Education may from time to time approve, he holds, or has become eligible for conferment of, a degree in law in the grant of that university college or institution which the Council may in each particular case approve.....

(c) He possess any other qualifications which are acceptable to and recognised by the Council of Legal Education.”

Now that the petitioner does not have a degree in law obtained in Kenya, his qualifications from whatever college or institution outside Kenya had to be subjected to approval by the Council of Legal Education. His qualification was considered by the Council and was rejected. The court cannot go into the merits of that decision.

The Advocates (Degree Qualifications) Regulations under the Advocates

Act section 13 (1) (b) have a Schedule showing the universities recognised by the Council of Legal Education. The petitioner indicated that some of these universities offer either BA in Law, B. Juri, B.A. Legal (Science) and yet are recognised by the Council. It is, however, clear that a BA degree in Politics and Law from University of Bradford is not one of those mentioned. Infact the University of Bradford is not mentioned in the Schedule. When the petitioner brought the degree it was supposed to be scrutinised by the respondents and either approved or not. This is what regulation 3 of the Schedule says.

In conclusion, I find that the respondents cannot be faulted for having refused to admit the petitioner to the ATP programme at the Kenya School of Law. In refusing to admit him, the respondents did not infringe or threaten to infringe any of his fundamental rights or freedoms. The petition lacks merits and is dismissed with costs.

Dated, signed and delivered at Kisumu this 31st day of January 2014.

**A.O.
JUDGE**

MUCHELULE